IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 23, 2001

STATE OF TENNESSEE v. WILLIAM D. BRITT

Appeal from the Criminal Court for Sullivan County
No. S43,321 Phyllis H. Miller, Judge

No. E2000-01107-CCA-R3-CD
February 23, 2001

The defendant appeals from his Sullivan County Criminal Court sentence for Class C felony theft over $10,000 but less than $60,000. Tenn. Code Ann. §§ 39-14-103, -14-105(4) (1997). The trial court sentenced the defendant as a Range I standard offender to three years in the Department of Correction and ordered restitution to the victim of the theft in the amount of $7,000. On direct appeal, the defendant presses his claim that the trial court incorrectly imposed an incarcerative sentence rather than some form of alternative sentencing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

Julie A. Rice (on appeal) and Andy Kennedy, Assistant Public Defender (at trial), for the appellant, William D. Britt.

Paul G. Summers, Attorney General and Reporter; Clinton J. Morgan, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant, William D. Britt, appeals from his Sullivan County Criminal Court sentence for Class C felony theft over $10,000 but less than $60,000. Tenn. Code Ann. §§ 39-14-103, -14-105(4) (1997). The trial court sentenced the defendant as a Range I standard offender to three years in the Department of Correction and ordered restitution to the victim of the theft in the amount of $7,000. On direct appeal, the defendant complains that the trial court incorrectly imposed an incarcerative sentence rather than some form of alternative sentencing. After a review of the record, the briefs of the parties, and the applicable law, we affirm the trial court's judgment and sentence.

The record before us is sparse, but from it we glean that on February 2, 1998 the defendant presented himself as a business patron at Action Rental located on North Eastman Road in Sullivan County. Using fictitious credentials and misrepresenting himself to be someone named Carson Mitchem, the defendant rented a bobcat loader, valued at $17,800, and a trailer, valued at $2,934. Pursuant to the rental agreement, the equipment was to be returned on February 4.

Instead of complying with the terms of the rental agreement, the defendant transported the equipment to Statesville, North Carolina, where he sold the loader and trailer for approximately $1,800. The defendant used the money from the sale to purchase drugs. When the equipment was not returned on the appointed day, Action Rental attempted to contact the defendant/lessee. Those efforts were unsuccessful, but in the process Action Rental discovered that the name, address, and other identifying information that had been supplied by the defendant were "fake."

Later, in April of the same year, Detective John Blessing with the Kingsport Police Department received information that the stolen loader and trailer had been sold to David Moore in North Carolina. Detective Blessing's investigation led to the recovery of the rental equipment, with a resulting loss to Action Rental of approximately $7,000 in lost rental revenue and time spent searching for the equipment.

On December 14, 1999, the Sullivan County grand jury returned a one-count indictment charging William D. Britt a/k/a Carson Mitchem with Class C felony theft of property valued at more than $10,000 but less than $60,000, in violation of Code section 39-14-103. On January 28, 2000, the defendant appeared before the trial court and pleaded guilty to the charged offense pursuant to a plea agreement with the state. The state recommended a three-year sentence for defendant as a Range I standard offender, and the matter of alternative sentencing was left to the trial court. A probation report was prepared, and on April 14, 2000, the trial court conducted an alternative sentencing hearing.

The defendant, who was 33 years old at the time, was the only witness who testified at the hearing. He testified that he "went and rented this Bobcat" and that he "took it to North Carolina and sold it." The defendant disclaimed knowing the worth of the equipment; he described it as "old and used," and he testified that his intentions were to take it back. The defendant was using drugs at the time. He said that he was daily mainlining crack cocaine and dilaudid. With the money from the sale of the equipment, the defendant purchased drugs.

The defendant acknowledged having prior alcohol-related convictions. He believed that if placed on probation he could "make it through" the probation period. He currently was self-employed and also worked for Liberty Paving. Because of bad weather conditions and because he was paying back the people who had made his $1,300 cash bond, he had not paid a $50 administrative fee that had been assessed by the court clerk.

The defendant was questioned by the state about the false identification he used to rent the equipment and other aliases by which he is known. He denied having a false driver's license; he said that he had "just a fake I.D." that he obtained from someone in Virginia who "had talked [him] into getting it." The fake I.D. was in the name of Carson Mitchem. The defendant also had used and was still using the name William Lambert, derived from his mother's maiden name. Doobie Lambert was a nickname by which he was further known.

The defendant was evasive when asked how the sale of the equipment was arranged. He said that he did not know the name of the person who referred him to the buyer in North Carolina or the name of the buyer. The defendant insisted that he was not involved in any kind of stolen property ring; his theft, he maintained, was an isolated occurrence despite the fake I.D. having been in his possession for four or five years. Regarding his employment, the defendant testified that he hauls house coal, seals driveways, and works for a paving company. The work, according to the defendant's description, was mostly seasonal. He said that if he could continue working, he would be "willing" to set up some kind of plan to pay restitution to Action Rental.

The defendant's drug use had been chronic and pervasive. He testified that he began using drugs when he was thirteen years old and that he used all that he could get. While out on bond, the defendant had smoked marijuana with his brother. Otherwise, he claimed that he had quit drugs and that he intended to stay clean.

Upon questioning by the trial court, the defendant divulged that two other men were involved in the theft, transportation, and sale of the rental equipment. The defendant identified one only as Randall, and he claimed the other one was presently incarcerated. Of the approximately $1,800 in proceeds from the sale, the defendant told the trial court that he personally received about $500, which he used to buy an "eight ball of cocaine and five pills." The defendant testified that he had a regular drug supplier, but when the trial court asked him to identify his source, he responded that he knew "just street names and stuff."

At the conclusion of the hearing, the trial court declined to impose alternative sentencing. Rather, the defendant was sentenced to three years incarceration in the Department of Correction, which was a minimum sentence for a Range I standard offender convicted of a Class C felony. Tenn. Code Ann. § 40-35-112(a)(3) (1997). He was also ordered to make restitution in the amount of $7,000 to Action Rental.[1]

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[1] We note that the defendant has not appealed the restitution portion of his sentence. Effective July 1, 2000, Code section 40-35-304, which addresses restitution, was amended to add subsection (h). Tenn. Code Ann. § 40-35-304(h) (Supp. 2000). That subsection specifically enables a victim, who has been awarded restitution, to convert any unpaid balance into a civil judgment after the time for payment or the payment schedule imposed has expired. That civil judgment is effective "for a period of ten (10) years from the date of entry and shall be enforceable by the victim or the victim's beneficiary in the same manner and to the same extent as other civil judgments are enforceable." Tenn. Code Ann. § 40-35-304(h)(7) (Supp. 2000).

When a defendant appeals a sentence, the reviewing court conducts a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Kenyetta Fields*, – S.W.3d –, – , No. E1998-00388-SC-R11-CD, slip op. at 3-4 (Tenn. 2001); *State v. Hooper*, 29 S.W.3d 1, 5 (Tenn. 2000); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Kenyetta Fields*, – S.W.3d at –, slip op. at 4. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Ashby*, 823 S.W.2d at 169. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, even if our independent judgment on the question might differ. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

An appropriate determination of the specific sentence and the propriety of sentencing alternatives is reached by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (1997); Tenn. Code Ann. § 40-35-103(5) (1997); *see Kenyetta Fields*, – S.W.3d at –, slip op. at 4. The record in this case reflects that the trial court properly considered and followed the sentencing principles relevant to probation and other alternative sentencing. Accordingly, the trial court's determination is entitled to the presumption of correctness.

"[D]etermining whether a defendant is entitled to an alternative sentence necessarily requires a separate inquiry from that of determining whether the defendant is entitled to full probation." *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). A defendant "is required to establish his suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger,* 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* Tenn. Code Ann. § 40-35-303(b) (1997); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper,* 29 S.W.3d 1 (Tenn. 2000).

A defendant is presumed to be a favorable candidate for alternative sentencing if, under Code section 40-35-102(6), the defendant is an especially mitigated or standard offender of a Class C, D, or E felony and does not meet the criteria of section 40-35-102(5). Tenn. Code Ann. § 40-35-102(6) (1997); *Kenyetta Fields*, – S.W.3d at –, slip op. at 5. The disqualifying criteria in section 40-35-102(5) are that "the defendant must not have committed the 'most severe offense,' nor have a criminal history evincing either 'a clear disregard for the laws and morals of society,' or 'failure at past efforts at rehabilitation.'" *Id.* (citing Tenn. Code Ann. § 40-35-102(5) (1997)).

In this case, the defendant's criminal history reflects convictions for alcohol/drug offenses and driving-related offenses committed in Virginia. These convictions include public intoxication, driving under the influence of an intoxicant, no operator's license, driving on a suspended license, seat belt law violation, and violation of registration law. According to the probation report prepared, the defendant never served an incarcerative sentence on these offenses; rather, a fine was assessed in each instance.

Recently, the supreme court in *State v. Kenyetta Fields*, held that the defendant in that case (a Range I offender convicted of a Class C felony) was presumed to be a favorable candidate for alternative sentencing despite that his criminal record consisted "of two traffic violations and two misdemeanor convictions." *Kenyetta Fields*, – S.W.3d at –, slip op. at 5. Fields's convictions do "not display a clear disregard for the law; nor does his record indicate any failed efforts at rehabilitation." *Id.*

In light of *Kenyetta Fields*, it is debatable whether the defendant's misdemeanor convictions rise to a level that displays a clear disregard for the law. Assuming they do not, the defendant is presumed to be a favorable candidate for alternative sentencing, pursuant to Code section 40-35-102(6). Even if, however, the defendant is so regarded, the evidence in this record soundly rebuts the presumption.

The probation report contains information that in 1991 the defendant was charged with felony larceny in Virginia and that in 1989 the defendant was arrested for DUI and obtaining goods by false pretense in West Virginia. The trial court questioned the defendant about these charges, and his responses implicated him in both offenses, although he tried to mitigate his culpability. In delivering its sentencing findings, the trial court then stated,

> The story about the guns [the felony larceny], you know, it's interesting that here you are caught for this offense and both of the others, the felony larceny that they had dismissed in here [probation report] but you said that you were – you served some time in jail, you were put on probation, you had to make restitution. And then the other one, the VCR case [obtaining goods by false pretenses] which probably was dismissed if you paid for the VCR, they're along the same lines as what you've ended up in court for here.

These findings, we believe, supply an adequate basis for denying alternative sentencing because they evidence the need to protect society from an offender with a long history of criminal conduct. Tenn. Code Ann. § 40-35-103(1)(A) (1997). The evidence of this need overcomes any statutory presumption that this defendant is a favorable candidate for alternative sentencing.

____________Additionally, weighing in on the side of evidence that rebuts the presumption is the trial court's evaluation of the defendant's demeanor, his credibility, and his remorse. The trial court bluntly declared more than once that it did not believe the defendant's testimony, that his denial of having previously used the fake I.D. was unbelievable, and that the defendant was not credible. Even reading from an appellate record, these particular character traits are obvious.

Lack of candor and credibility are reliable indications of a defendant's potential for rehabilitation. *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *State v. Dowdy*, 894 S.W.2d 301, 305-06 (Tenn. Crim .App. 1994). The trial judge is in the best position to assess a defendant's credibility and potential for rehabilitation. A defendant's potential for rehabilitation "should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5) (1997). A defendant's lack of candor to the sentencing court reflects poorly on the defendant's rehabilitative potential and thus, is a basis for denial of alternative sentencing. *State v. Leggs*, 955 S.W.2d 845, 851-52 (Tenn. Crim. App. 1997); *State v. Gennoe*, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992).

We conclude that the trial court correctly considered and relied on the defendant's lack of candor and credibility in this case. This factor alone warrants denial of alternative sentencing in this case.[2]

Furthermore, once the statutory presumption of favorable candidacy for alternative sentencing has been rebutted by evidence to the contrary, "the defendant bears the burden of showing that he is entitled to *any* probation." *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, slip op. at 4 n.1 (Tenn. Crim. App., Knoxville, Dec. 4, 2000). The defendant has failed to carry this burden. The trial court found that the defendant had not carried his burden of demonstrating that any probation, much less full probation, would serve him or the community, the ends of justice, "or anything else." We agree. At best, all that the defendant offered was an insipid and uninspired statement that if placed on probation he believed that he could "make it through" the probation period. The defendant's assurance that he had quit using drugs and that he intended to stay clean was equally vapid and, at any rate, was undermined by his marijuana smoking while on bond and shortly before the sentencing hearing.

Therefore, in consideration of the foregoing and the record as a whole, we affirm the sentence imposed by the trial court.

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[2] We are aware that the trial court stated that confinement is necessary to avoid depreciating the seriousness of the offense. To be sure, alternative sentencing properly can be denied to avoid depreciating the seriousness of the offense under Code section 40-35-103(B) if the circumstances of the offense as committed are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," and the nature of the offense outweighs all other factors. *See Kenyetta Fields*, — S.W.3d at —, slip op. at 6; *State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App. 1991). We believe that the defendant's offensive conduct does not meet this exacting standard; however, the trial court referred to the need to avoid depreciating the seriousness of the offense in passing. We have concluded that the defendant's criminal history and his lack of candor and credibility were the bases for the denial of altemative sentencing. Even so, the denial of alternative sentencing is otherwise justified based on the defendant's dim prospects for rehabilitation as illustrated by his lack of candor and credibility.

JAMES CURWOOD WITT, JR., JUDGE